Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-432

SEPTEMBER TERM, 2006

Mary Breslin-Synnott	}	APPEALED FROM:
	}	
	}	
v.	}	Chittenden Family Court
	}	
James Synnott III	}	
	}	DOCKET NO. 856-10-99 Cndm

Trial Judge: Helen M. Toor

In the above-entitled cause, the Clerk will enter:

Husband appeals the family court=s order denying his motion to modify maintenance and requiring him to pay maintenance arrears totaling $10,178. We affirm.

The parties were legally separated in June 2001 following a twenty-five-year marriage. Pursuant to the permanent separation order, husband is required to pay wife $5000 per month in maintenance until he reaches age sixty, with a two percent annual cost-of-living increase. The level of maintenance was based on husband

earning an expected $185,000 in 2001 as a commercial airline pilot. In 2003, husband sought to reduce his maintenance obligation, claiming that his income would substantially decline because of a variety of factors. In a May 2003 decision, the family court denied husband=s motion to modify, noting that his prediction of reduced income had proven to be inaccurate in the past and thus was not a good indicator of what he would actually earn in the future. The court determined that husband had not shown a significant decrease in income and thus had not met the threshold requirement of demonstrating a real, substantial, and unanticipated change in circumstances.

In the instant proceeding, husband filed a second motion to modify. Following an evidentiary hearing, the family court denied husband=s motion in a September 2005 decision, concluding that husband had once again failed to demonstrate changed circumstances. Given the inaccuracy of his past claims, the court expressed skepticism regarding his most recent claims of a significant reduction in future income. The court also concluded that even if his claims proved to be accurate, he no longer had to pay child support or make payments on a significant debt, and therefore his claimed reduction in income was insignificant in terms of his ability to pay maintenance. On appeal, husband argues that under the most recent airline labor agreement his salary will be between $144,000 and $149,000, which constitutes a real and substantial change of circumstances from what the parties anticipated at the time of the final divorce order.

As a preliminary matter, we address wife=s motion to strike portions of appellant=s printed case, exhibits, and briefs. Appellant=s printed case includes a number of documents that were not admitted into evidence at trial, including a letter of agreement between US Airways and its airline pilots. Throughout his briefs, appellant refers to these documents, which appear to confirm his claim of a reduction in pay. Husband acknowledges that the family court denied his request to admit the airline letter of agreement, and further states that the court=s refusal to admit that document is an important part of his appeal; however, he makes no attempt in his appeal to demonstrate that the court erred by refusing to admit the document. As for copies of federal regulations, recent paychecks, and a medical insurance statement that husband submits as exhibits, he argues that they should be considered part of the record on appeal because he referred to them during the hearing on his motion to modify. The fact remains, however, that those documents were not admitted into evidence, and therefore are not part of the record on appeal. See V.R.A.P. 10(a) (record on appeal shall consist of original papers and

exhibits filed in trial court, transcript of proceedings, and certified copy of docket entries); State v. Brown, 165 Vt. 79, 82 (1996) (documents that are not among original papers and exhibits on file in trial court are not part of record on appeal). Accordingly, we grant wife=s motion to strike portions of husband=s printed case and brief including or referring to documents not admitted into evidence.

Turning to the merits of this appeal, as stated above, the original $5000 maintenance award was based on husband making $185,000 in 2001. As it turns out, husband earned more than $185,000 in 2001, and he earned $232,860 in 2002. Moreover, notwithstanding his claim that he would earn significantly less than $185,000 in 2003, husband wound up earning $196,735 that year. In 2004, husband earned $202,861, and, at the time of the hearing on his second motion to modify, his year-to-date income was $85,347, which projected into an income of over $186,000 for 2005, not including other forms of compensation that provided him several thousand dollars in 2004. Husband=s explanation why his future income will decline was inconsistent with, and does not overcome, the evidence admitted at trial concerning his actual earned income. Given the evidence of current income, and husband=s history of underestimating his future income, the family court was reasonable in expressing skepticism at his income forecast.

In any event, the trial court did consider the forecast, but, taking reduced expenses into account, was not persuaded that the lower income would amount to a change sufficient to reopen the maintenance order. The court found that even if husband=s projections proved to be accurate, his projected reduction in income would be insignificant in light of the fact that (1) husband had paid off a significant debt, and (2) the parties= children no longer required child support because they had reached the age of majority. Balancing the claimed cut in pay against the reduced expenditures, the trial court correctly computed a financial change of circumstances of less than five percent, in contrast to the thirty-two percent claimed by husband. Upon review of the record, we conclude that husband has failed to demonstrate that the court abused its discretion in denying his motion to modify, particularly given that the proper focus of the court=s inquiry is Awhether a substantial change of circumstances existed at the time of the hearing.@ DeKoeyer v. DeKoeyer, 146 Vt. 493, 495 (1986); see Bullard v. Bullard, 144 Vt. 627, 629 (1984) (proof of substantial change of circumstances is jurisdictional prerequisite to obtaining modification of maintenance obligation, and burden of proof rests on party seeking

modification).

Husband also asks this Court to reverse the family court=s order requiring him to pay wife $10,178 in maintenance arrears. He claims that the arrears are the result of anticipated pay increases that did not occur, and that, in any event, the parties reached an agreement relieving him of the duty of paying the cost-of-living increases. Once again, we find no error. The annual adjustment to the maintenance obligation was based on anticipated cost-of-living increases, not husband=s pay increases. In any event, as noted above, the record demonstrates that husband obtained significant pay increases well above his $185,000 projected income for 2001. Finally, there is no evidence in the record of an agreement in which wife waived the cost-of-living increases tied to husband=s maintenance obligation.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Denise R. Johnson, Associate Justice

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Brian L. Burgess, Associate Justice